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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 377

STANDARD OIL COMPANY, a corporation,
Petitioner

vs.

CITY OF TALLAHASSEE, a municipal corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 30, 1950. Petition for re-hearing denied on July 28, 1950.

Opinions Below

The memorandum decision of the District Court (R. 124) is reported in 87 Fed. Supp. 145. The opinion of the Court of Appeals (R. 141) is reported in 183 Fed. (2d) 410 (Advance Sheet 183 Fed. (2d) No. 4, Sept. 18, 1950).

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1950, (R. 141) and Petition for re-hearing was denied on July 28, 1950 (R. 156). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Question Presented

Where a gasoline service station is located in an area where the operation of other businesses is permitted and the area is not adaptable to residential development, is a municipal zoning regulation valid, where same creates a residential district within the area, prohibits the operation of said station, and thereby virtually confiscates said property, there being no basis to support such regulation other than the mere location of the station near public buildings?

Statement

On April 28, 1949 petitioner filed its complaint in the United States District Court alleging that during the year 1938 it purchased a parcel of land in Tallahassee, Florida for the sole purpose of erecting thereon a service station as one of the outlets for the sale of its products; that at the time of said purchase there did not exist any restriction by municipal ordinance, or otherwise, against such use and that petitioner did, at considerable expense, construct a service station thereon, opening same for business November 1, 1938; that under the zoning ordinances then in effect said property was located in Residence District "B", which permitted the construction and operation of said station; that under date of January 24, 1939, respondent adopted an ordinance which changed said location to Business District "A", and provided that no additional service stations should be constructed or operated within such district and

that all locations of sites therein then used for motor vehicle service stations should be discontinued on and after January 1, 1949; that another ordinance was adopted by respondent on April 27, 1948 (R. 2, 3) wherein said location was changed from Business District "A" to Residence District "A", the provision with reference to the discontinuance of service stations within the area where petitioner's station is situate being carried forward therein; that the enforcement of said ordinance as to the discontinuance of service stations was deferred by respondent until May 1, 1949 and respondent notified petitioner to discontinue the operation of said station prior to that date. The complaint further alleges that the property immediately adjacent to that of the petitioner's has not changed essentially in character since the construction of said service station and that said district is not naturally or primarily a residential one, that the classification of same as residential is arbitrary and unreasonable and has no relation to the announced purposes of the ordinance. It is further alleged that the exemption from the ordinance of other non-conforming business uses in said area except filling stations is discriminatory; and further, that the operation of said station is not inimical to the safety, health, morals or general welfare of the community but, on the contrary, is, because of its location, a great public convenience (R. 4, 5); that said property is not adaptable to any other use permitted by the ordinance, nor will the ordinance change its adaptability; that the re-zoning of said property from time to time has been done without regard to the character of the property in said district (R. 8, 9); that by the terms of the last mentioned ordinance which changed the area to Residence District "A" there was left therein as Business District "A" a small area or island just one block east of petitioner's property in which

the operation of many businesses is permitted, although there is nothing that distinguishes the area comprising said island from any of the surrounding property and particularly from that of the petitioner (R. 13); that the discriminatory nature of the ordinance, as applied to petitioner's property, is accentuated by reason of the fact that, with no reasonable basis for distinction, the operation of motor vehicle filling stations is permitted as a non-conforming use in all zones or areas of the City except for a small portion of Residence District "A" where petitioner's station is located (R. 14, 15); that petitioner's station is located just one short block south of the principal business area of said city (R. 8); that the building on petitioner's property can not be used for any purpose other than that for which it was constructed and if such use is prohibited, same will remain, but unused and as a complete loss to petitioner; that said property, being undesirable and unadaptable for residential development and being closed to further business of any kind by said zoning ordinance, the result would be confiscatory although the property would continue liable for the payment of ad valorem taxes to Leon County, Florida as well as to respondent (R. 10). The complaint further alleged that by reason of the foregoing allegations, said zoning ordinance, in its application to petitioner's property denies it the equal protection of the laws and deprives it of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and contrary to the provisions of Sections 1 and 12 of the Declaration of Rights of the Constitution of the State of Florida (R. 10, 11).

The District Court entered a temporary restraining order as prayed on April 30, 1949. (R. 15, 16).

Respondent filed its answer in which its defenses were in substance that the area within which petitioner's property is located is devoted to residential use, for parks and for government buildings, that the vehicular and pedestrian traffic is heavy at the street intersection where same is situate and that by reason of the nature of the business conducted by petitioner, the ordinance complained of is a proper exercise by the respondent of its police power. Respondent also denied that the removal provisions of the ordinance were arbitrary, unreasonable or discriminatory and included a denial of the allegation of the complaint that the operation of motor vehicle stations is permitted as a non-conforming use in all zones and areas of the city except the area of the city in which petitioner's station is located. (R. 17, 18, 19).

The trial court, after considering the pleadings, stipulation of counsel and testimony, dissolved the temporary restraining order and dismissed the suit. (R. 122, 123).

In its memorandum decision the court conceded that the facts in the case as alleged in the complaint were not in essential dispute (R. 129, 130, 131, 132, 133), but, ignoring same, said that since the service station is within close proximity to the state capitol, several state office buildings and a public school, this constitutes sufficient ground for the city to require its discontinuance (R. 131). The court said it would not substitute its judgment for that of the city authorities. (R. 134).

Petitioner prosecuted an appeal to the U. S. Court of Appeals, 5th Circuit, and by the majority opinion of said court filed on June 30, 1950, the judgment of the trial court was affirmed (R. 141). Chief Judge Hutchinson filed a dissenting opinion (R. 147).

Following the opinion of the Court of Appeals, petitioner filed a petition for re-hearing of the case in said court (R. 150), which petition was considered and denied by order of said court filed July 28, 1950. (R. 156).

Reasons for Granting the Writ

1. The majority decision of the Court below in the nstant case is in direct conflict with the decisions of this court in the cases of *Nectow* vs. *City of Cambridge*, 277 U. S. 181, 72 Law Ed. 843 and *Euclid* vs. *Ambler Realty Company*, 272 U. S. 365; 71 Law Ed. 303; 47 Sup. Ct. Rep. 114. In those cases the principle was clearly established that the governmental power to restrict the use of property by municipal zoning regulations cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare. In the Nectow case where invasion of the property was found to be highly injurious and a necessary basis for the support of the invasion was wanting, the court held that the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.

In the instant case, it is conceded that the zoning regulation, as applied to petitioner's property, results in virtual confiscation, nevertheless, the Court of Appeals sustained the ordinance without any basis to support it except that the property of petitioner, a filling station, is located in close proximity to the State Capitol and other public buildings.

This conclusion is reached although there is nothing in the opinion nor in the record of the case to show how the mere location of said property near public buildings bears any relation to the public health, safety, morals, or general welfare.

The conflict between the principle of the *Nectow* case and the majority opinion of the Court of Appeals in the instant case is pointed up in the dissenting opinion filed by Chief Judge Hutchinson in which he said:

> "Fully canvassing the evidence in the light of the contentions made and specifically rejecting those that the ordinance promoted health, safety, or morals, the court, though he agreed with the defendant that the value of his property would be ruined and that the zoned property was not adapted to the use for which it was zoned, to-wit, residence property, yet sustained the ordinance on two considerations, which were inadequate to sustain it. One of these, a consideration of fact, was that the property was within close proximity to the state capitol, several state office buildings and a public school. The other, a consideration of law, was that the court should not substitute its judgment for that of the legislative body of the city." And "I am in no doubt that in sustaining this admittedly confiscatory ordinance, a good general principle, the public interest in zoning, has been run into the ground, the tail of legislative confiscatory by caprice has been permitted to wag the dog of judicial constitutional protection."

2. The majority decision of the Court below in the instant case is in further conflict with the decision of this Court in the case of *Nectow* vs. *City of Cambridge*, supra, and also in conflict with the decision of this Court in the case of *Euclid* vs. *Ambler Realty Co.*, supra, and with the decisions of the Florida Supreme Court in the cases of *Forde* vs. *City of Miami Beach*, 1 Sou. (2d) 642, and *City of Miami Beach* vs. *Ocean and Inland Company*, 3 Sou. (2d) 364, in that said opinion concludes, as a matter of law, that the Court should not substitute its judgment for that of the legislative body. In the cases cited, the prin-

ciple is clearly established that when the constitutionality of a zoning ordinance as applied to specific property is challenged, it is the duty of the Court to inquire into the factual situation to determine whether restrictions on the use of property are necessary in the interest of the public welfare. These decisions clearly recognize the power of courts to look behind the legislative act to determine that same is founded on reason and necessity and to prevent the injury of property rights where the attempted restrictions do not have a substantial relation to the public safety, health, morals or welfare.

3. Settlement of the question by this court is plainly in the public intrest, it being of great importance to urban property owners in growing communities throughout the United States whose property and business is in close proximity to public buildings to know whether, as in the instant case, a municipality may constitutionally invade their property rights by use restrictions which amount to confiscation, where the sole basis to support such restriction is that the property is located close to public buildings and therefore in some unexplained way affects the general welfare.

4. The majority decision of the Court below is believed to be erroneous. The opinion admits that the effect of the ordinance as applied to petitioner's property amounts to virtual confiscation but refuses to challenge the wisdom of the zoning authorities. The decision concludes that the ordinance cannot be viewed as arbitrary and unreasonable or as having no relation to the safety and general welfare of the community because petitioner's service station is located near public buildings. The Court utterly ignored the undisputed facts that show petitioner's property is

located on the principal business street of the city on which only one residence, now used for offices, has been constructed since 1940, that it is located one block south of the principal business section of the city, and that the natural trend in the area is toward business rather than residential development (R. 41, 52, 71). The trial Court conceded that six large State office buildings, replacing residences, have been constructed in the area subsequent to the erection of petitioner's service station, but indulged in the fallacious reasoning that buildings providing offices for State employees are not business buildings. Actually, the evidence shows that if the character of the area was residential prior to the construction of these buildings the erection and operation of same now definitely removes it from that category. Furthermore, the facts were undisputed that there have been no accidents during the existence of the station caused from automobiles either entering or leaving it (R. 180), and that respondent does not even maintain a traffic signal light at the intersection where the property is located (R. 22, 43, 44). Respondent admitted that the station is neat, clean and run in accordance with high ethical and moral standards (R. 18). Examination of these facts would have shown beyond doubt that the ordinance goes beyond the limits of necessity for, and bears no relation to, the public health, safety, morals or general welfare. In restricting the use of property to purposes for which same is not adaptable, and with no basis to support the restriction, the ordinance is clearly arbitrary and unreasonable, and on the authority of the cases heretofore cited should have been held invalid.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE A. TRUETT

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Counsel for Petitioner.

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v.

CITY OF TALLAHASSEE, A MUNICIPAL CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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